



In the Supreme Court of Appeals of West Virginia

CARA NEW, Plaintiff below,
Petitioner

vs.)12-1371

GameStop, Inc., d/b/a GameStop;
Aaron Dingess, Individually, and
David Trevathan, Individually
Defendants Below, Respondents

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ASSIGNMENTS OF ERROR

1. Did the circuit court err in enforcing an arbitration agreement that neither party disputes governs petitioner's claims, and is an agreement that petitioner expressly acknowledged and which is both "crystal clear" and presumed by this Court to be a provision for which the parties bargained?

2. Is the arbitration agreement between petitioner and respondents unconscionable notwithstanding that the agreement does not alter petitioner's rights, and the obligations are mutual and provide petitioner the same opportunity for discovery and recovery as in West Virginia state court?

STATEMENT OF THE CASE

Plaintiff-Petitioner Cara New agreed to arbitrate “all workplace disputes or claims” when she accepted and then continued employment with GameStop as an assistant manager beginning in March 2009. App.88 (Ms. New’s signed acknowledgment). Nevertheless, she attempts to avoid her part of the agreement by claiming (1) it is really no agreement at all, or alternatively (2) the agreement is unconscionable. The circuit court correctly determined that neither argument is supported by the facts or the law.

I. MS. NEW AGREES IN WRITING TO GAMESTOP’S COMPREHENSIVE, MUTUALLY BINDING DISPUTE-RESOLUTION PROGRAM, WHICH INCLUDES A BINDING ARBITRATION AGREEMENT.

GameStop has implemented a comprehensive, mutually binding dispute resolution program called C.A.R.E.S. (Concerned Associates Reaching Equitable Solutions). App.71-88 (summary of C.A.R.E.S. program). The program culminates in binding arbitration before the American Arbitration Association (“AAA”). App.213. And it expressly provides that it is a “mutual agreement” to arbitrate pursuant to the Federal Arbitration Act (“FAA”). App.207.

The agreement does not favor either party. Instead, it:

- Incorporates the AAA’s Employment Dispute Resolution Procedures,
- Provides a neutral selection process for the arbitrator,
- Allows either party to be represented by counsel,

- Permits discovery in any form allowed by the Federal Rules of Civil Procedure,
- Permits motions allowed by the Federal Rules of Civil Procedure, and
- Applies the state or federal substantive law that would be applied by a federal district court sitting where the events giving rise to the claim took place.

App.214-16.

Ms. New received a copy of the Store Associate Handbook on March 31, 2009, which included the “GAMESTOP C.A.R.E.S. RULES OF DISPUTE RESOLUTION PROGRAM INCLUDING ARBITRATION.” App.164-224. When she received the handbook, Ms. New signed an acknowledgment with a prominent heading to alert employees that they are agreeing to an arbitration provision. App.88 (noting, in all caps, that C.A.R.E.S. includes arbitration).

Although Ms. New was an at-will employee, she specifically acknowledged her “understand[ing] that by continuing my employment with GameStop following the effective date of GameStop C.A.R.E.S., *I am agreeing that all workplace disputes or claims, regardless of when those disputes or claims arose, will be resolved under the GameStop C.A.R.E.S. program, rather than in court.*” App.88 (emphasis added). It is undisputed that all of her claims fall under C.A.R.E.S.

II. MS. NEW FILES SUIT NOTWITHSTANDING THE ARBITRATION AGREEMENT, AND THE CIRCUIT COURT COMPELS ARBITRATION.

Ms. New worked for GameStop until April 2010. App.3. Eight months later, on December 10, 2010, she filed a complaint with the U.S. Equal Employment Opportunity Commission (“EEOC”). *Id.*

On June 13, 2011, the EEOC notified her that it could not conclude there was any statutory violation and that she had 90 days to file suit alleging, among other things, a Title VII claim. App.92-94. Almost six months later, Ms. New filed suit on December 2, 2011, alleging various claims under West Virginia state law, all of which are indisputably “workplace disputes or claims.” App.4.

GameStop timely moved to dismiss the complaint pending mandatory arbitration. App.23-52. Ms. New responded one week before the U.S. Supreme Court issued its decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), which addressed West Virginia law on the enforceability of arbitration agreements. App.53-55. In light of the *Marmet* decision, the circuit court requested additional briefing. App.98.

After extensive briefing, the circuit court entered detailed findings of fact and conclusions of law. App.1-10. The court specifically found that the arbitration agreement is not unconscionable. App.7-24. The court did not, however, determine that Ms. New’s claims are time barred. Instead, in response to her Rule 60 motion

for relief, the court explained that “[w]hether any particular claim is barred or remains viable is a matter to be determined by the Arbitrator.” App.162.

SUMMARY OF ARGUMENT

Arbitration agreements—whether as part of an employment or any other relationship—are heavily favored and must be enforced unless unconscionable. The two issues before this Court are thus straightforward. Did Ms. New agree to arbitrate her claims? And if so, was that agreement unconscionable? Because Ms. New did agree to arbitrate, and because that agreement was not unconscionable—as the circuit court found—the order compelling arbitration should be affirmed in all respects.

There is no dispute that Ms. New received and acknowledged the arbitration agreement between her and GameStop. Nor is there any dispute that the arbitration agreement covers all of Ms. New’s claims. Indeed, Ms. New acknowledges the existence of an “arbitration agreement” (*e.g.* at 10), but curiously argues that the “arbitration agreement” somehow does not obligate her to arbitrate because it is not a contract. *Id.* at 10-14. That argument is incorrect not only as a straightforward matter of West Virginia contract law, but also as a matter of simple common sense.

It is well settled that this Court “presume[s] that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes under the contract[.]” Syl. Pt. 3, *Clites v. Clawges*, 224 W. Va. 299, 300, 685 S.E.2d 693, 695 (2009). Indeed, in *Clites*, this Court enforced an arbitration agreement under facts nearly identical to those here,

where the plaintiff agreed to arbitrate all disputes by signing paperwork as part of the initial employment process. And contrary to Ms. New's assertion (at 12-14), the arbitration agreement is not "ambiguous." It clearly and unmistakably binds *both parties* to arbitrate their "workplace disputes and claims." App.88.

Consequently, the arbitration agreement is not unconscionable either procedurally or substantively under the factors set out in *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*"), judgment vacated by *Marmet Healthcare Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012); and reaffirmed in *Brown v. Genesis Healthcare Corp.* 229 W. Va. 382, 729 S.E.2d 217 (2012) ("*Brown II*"). Ms. New voluntarily entered into the agreement in exchange for employment and the parties mutually agreed to arbitrate all disputes between them. The agreement permits Ms. New to bring any claim for which limitations has not expired under applicable state or federal law, allows discovery, ensures a neutral arbitrator, and is less expensive than filing a claim in West Virginia state court. The agreement is valid and enforceable, and the circuit court's order compelling arbitration should therefore be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents issues that have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs and record on appeal. This Court's decisional process would not be significantly aided by oral argument. If this Court determines that oral argument would be useful, then GameStop respectfully requests an opportunity to present argument. This matter, if argued, should be argued under Rule 19.

ARGUMENT

I. THE LIBERAL POLICY IN FAVOR OF ARBITRATION APPLIES WITH FULL FORCE AND COMPELS ARBITRATION OF ALL MS. NEW'S CLAIMS.

The rule is well established that courts must enforce an arbitration agreement covered by the FAA. *See Marmet*, 132 S. Ct. at 1202 (holding that state and federal courts must enforce the Act “with respect to all arbitration agreements covered by that statute”); *see also id.* at 1203 (courts must “enforce the bargain of the parties to arbitrate”) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). That rule best promotes the “liberal policy favoring arbitration.” *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (noting liberal policy in favor of arbitration, which displaces any state law that would prohibit arbitration); *see also Clites*, 299 W. Va. at 304-305, 685 S.E.2d at 698-99 (noting that FAA preempts state law that would “undercut the enforceability of arbitration agreements”).

In an attempt to avoid the force of that rule, Ms. New argues that the circuit court’s order compelling arbitration must be reversed because, in the absence of an employment contract, the parties could not have validly agreed to arbitrate. That argument fails, however, because it is wrong on the facts and contrary to established West Virginia and federal law.

A. The FAA and U.S. Supreme Court Precedent Require Enforcement of the Arbitration Agreement.

In enacting the FAA, Congress intended to overcome the past reluctance of courts to enforce arbitration agreements by placing those agreements on an equal footing with other contracts and establishing a federal policy in favor of arbitration:

[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.

In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

Perry v. Thomas, 482 U.S. 483, 483 (1987) (citation omitted).

As the U.S. Supreme Court repeatedly has recognized, states cannot apply to arbitration agreements any rule of enforceability different from or more rigorous than that applied to other contracts. *Id.* at 492 n.9 (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.”); *Concepcion*, 131 S. Ct. at 1750; *see also Brown II*, 729 S.E.2d at 226 (“[T]he courts of this State are not hostile to arbitration or to adhesion contracts.”).

The policy favoring arbitration applies with full force here, where Ms. New and GameStop agreed to submit all workplace disputes and claims to arbitration. There is no basis to avoid that agreement.

B. The Arbitration Agreement is Binding and Enforceable.

“It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract[.]” *Clites*, 224 W. Va. at 306, 685 S.E.2d at 700 (citation and quotation marks omitted). When determining arbitrability, there are only two questions to answer: (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims at issue fall within the substantive scope of that arbitration agreement. Syl. Pt. 2, *TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E.2d 293, 294 (2010). This Court’s review is de novo. *Brown I*, 724 S.E.2d at 267-68.

1. Ms. New Entered into a Valid Arbitration Agreement with GameStop.

Ms. New agreed to arbitrate all of her workplace or employment-related disputes with GameStop when she signed an acknowledgment—with a prominent heading—that she was agreeing to an arbitration provision contained in her employee handbook.

**ACKNOWLEDGMENT AND RECEIPT OF THE STORE
ASSOCIATE HANDBOOK AND GAMESTOP C.A.R.E.S. RULES
INCLUDING ARBITRATION**

I acknowledge that I have received a copy of the GameStop Store Associate Handbook, including the GameStop C.A.R.E.S. Rules for Dispute Resolution. The Rules set forth GameStop’s procedure for resolving workplace disputes ending in final and binding arbitration. The Handbook summarizes certain information about my job and company policies, procedures and practices. I understand that it is my

responsibility to read and familiarize myself with the information contained in the Handbook. I understand that by continuing my employment with GameStop following the effective date of GameStop C.A.R.E.S., I am agreeing that all workplace disputes or claims, regardless of when those disputes or claims arose, will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective action claims in which I might be included. I understand that at any time and for any reason, GameStop may make changes to the Handbook, except for the Rules, without prior notice. I understand that my employment with GameStop is “at will,” and that either I or GameStop may end my employment at any time and for any reason.

App.88 (noting, in all caps, that C.A.R.E.S. includes arbitration).

This Court has held that employers and employees may enter into valid agreements to arbitrate on facts that, if anything, are much less compelling than those here.

In *Clites*, for example, an employee attended a mass orientation which lasted about an hour. *Clites*, 224 W. Va. at 302, 685 S.E.2d at 696. She watched a video and was presented with a packet of materials containing various forms, acknowledgments, and documents requiring her review, completion, and signature. *Id.* Among those items was an arbitration agreement, which was “six pages long, single-spaced” and provided that the “[e]mployee acknowledges that his or her offer of and continued employment is consideration for his/her promises contained in this Arbitration Agreement.” *Id.* at 306, 700. There was a dispute about whether the plaintiff had an opportunity to review the materials or if anyone brought the arbitration agreement to her attention. *Id.* But like here, the plaintiff signed an

acknowledgment that she had received the arbitration agreement. *Id.* at n.2. This Court concluded that the agreement was bargained for and enforceable. *Id.* at 306, 700. So too here.

Ms. New received and acknowledged the arbitration agreement. Indeed, she concedes (at 6) that she received the handbook. As in *Clites*, Ms. New agreed that “by continuing [her] employment with GameStop” she would resolve “all workplace disputes or claims” under C.A.R.E.S. “rather than in court.” App.88. There can be no serious dispute that Ms. New and GameStop entered into a valid arbitration agreement.

Ms. New’s only response (at 8) is that because the handbook as a whole does not constitute an employment contract, there was never an agreement to arbitrate in the first instance. But that argument misses the mark. Whether the handbook as a whole forms an employment contract is irrelevant. The only requirement is that Ms. New entered into “a valid *arbitration* agreement.” Syl. Pt. 2, *TD Ameritrade*, 225 W. Va. at 251, 692 S.E.2d at 294 (emphasis added); *see also Patterson v. Tenet Health Care, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997) (determining that arbitration provision within handbook was separate agreement even though handbook stated it was not forming an employment contract); *Lemmon v. Lincoln Prop. Co.*, 307 F. Supp. 2d 1352, 1355 (M.D. Fla. 2004) (concluding there was a binding arbitration agreement when plaintiff signed acknowledgment, even though

handbook was not a contract); *Curry v. MidAmerica Care Found.*, No. TH 02-0053-C t/h, 2002 WL 1821808, at *3-4 (S.D. Ind. June 4, 2002) (enforcing arbitration agreement contained in employee handbook); *Bishop v. Smith Barney, Inc.*, No. 97 CIV 4807 (RWS), 1998 WL 50210, at *5 (S.D.N.Y. Feb. 6, 1998) (same). As her acknowledgment and own brief (at 6) confirm, she did enter into a valid agreement to arbitrate.

Like the circuit court below, at least three federal district courts and two California state courts have examined the exact same C.A.R.E.S. Arbitration Agreement at issue here and found it to be valid, binding, and enforceable. *See Ellerbee v. GameStop, Inc.*, 604 F. Supp. 2d 349 (D. Mass. 2009); *McBride v. GameStop, Inc.*, No. 10-CV-2376-RWS, 2011 WL 578821, at *1 (N.D. Ga. Feb. 8, 2011); *Pomposi v. GameStop*, No. 3:09-CV-340 (VLB), 2010 WL 147196, at *1 (D. Conn. Jan. 11, 2010); *Yob v. GameStop, Inc.*, Superior Court of California, County of San Mateo, Case No. CIV517416 (Feb. 7, 2012); *Smusz v. GameStop Corp.*, Superior Court of California, County of Tuolumne, Case No. CV-56193 (May 6, 2011). That conclusion is correct.

2. There is Nothing “Ambiguous” About the Arbitration Agreement.

Seemingly taking a different tack, Ms. New asserts (at 12-14) that the agreement is “ambiguous.” In truth, that argument simply repackages her argument that there was no agreement at all because the handbook states that it does not

create an *employment* contract. Even Ms. New admits (at 12) that the arbitration provision is treated differently from the rest of the handbook in that GameStop may alter policies at any time without notice, but it cannot do so with C.A.R.E.S.

There is no ambiguity that the parties entered into a binding arbitration agreement. As the *Ellerbee* court found, the arbitration agreement’s provisions are “crystal clear” and “[t]here can be no doubt that the Rules specified that the C.A.R.E.S. program covered arbitration and was binding[.]” *Ellerbee*, 604 F. Supp. 2d at 355; *see also* App.88 (“I understand that by continuing my employment . . . I am agreeing that all workplace disputes or claims . . . will be resolved under the GameStop C.A.R.E.S. program rather than in court.”). Ms. New thus entered into a valid arbitration agreement with GameStop, and the first prong of the arbitrability test is satisfied.

3. Ms. New’s Claims Fall Within the Scope of the Arbitration Agreement.

The second prong of the arbitrability test—that the claims fall within the scope of the arbitration agreement—is indisputably satisfied here as Ms. New does not argue otherwise. Accordingly, both prongs of the arbitrability test are satisfied, and the circuit court properly granted GameStop’s motion to compel arbitration.

II. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE.

Because the parties entered into a valid arbitration agreement that covers Ms. New’s claims, the FAA mandates arbitration absent some reason why the

agreement should not be enforced. No reason exists here to avoid the arbitration agreement.

There are limited exceptions to enforcing an arbitration agreement, only one of which is at issue here. Ms. New contends only that the agreement is unconscionable. Under established West Virginia law, however, it is not. To avoid an arbitration agreement on the basis of unconscionability, Ms. New must prove *both* procedural and substantive unconscionability. *Brown II*, 729 S.E.2d at 227. The burden to prove both types of unconscionability is on the plaintiff. *Brown I*, 724 S.E.2d at 284. Ms. New cannot prove either.

A. There is No Procedural Unconscionability.

Ms. New's procedural unconscionability argument fails for at least two reasons. First, she was more than capable of understanding and entering into the arbitration agreement. And her suggestion (at 20-21) that any contract of adhesion is procedurally unconscionable is simply wrong. This Court has no hostility to adhesion contracts. *Brown II*, 729 S.E.2d at 226.

Second, Ms. New's argument (at 21-24) impermissibly asks this Court to analyze the merits of the dispute, rather than simply determine that there is an arbitration agreement. In particular, she raises (at 22-23) the issue of whether her claims are time barred. That is a question for the arbitrator, however, and this Court has made clear that the only relevant question for purposes of this appeal is whether

an enforceable arbitration agreement covers the claims at issue—all other questions are resolved in arbitration. *TD Ameritrade*, 225 W. Va. at 253, 692 S.E.2d at 296.

1. Ms. New Was Capable of Understanding That She Was Agreeing to Arbitrate All Work-Related Claims.

“Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract.” *Brown II*, 729 S.E.2d at 227. This Court considers a variety of factors, including the plaintiff’s “age, literacy, or lack of sophistication” as well as “hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed[.]” *Id.* Ms. New’s brief addresses only a few of these factors. Moreover, Ms. New’s position leads to the absurd result that anyone who has completed high school and worked for several years is incapable of understanding a simple contract. This cannot be the law.

She contends that her age, literacy, or alleged lack of sophistication somehow militates against conscionability.¹ Pet. Br. 20. But Ms. New was 27, with a high school degree, and qualified to be part of store management. App.9. She was fully capable of understanding the import of her acknowledgment, which states: “I understand that by continuing my employment with GameStop following the effective date of GameStop C.A.R.E.S., *I am agreeing that all workplace disputes*

¹ Ms. New never sought to introduce any evidence or develop a factual record to show that she lacked the requisite sophistication or literacy to understand the straightforward agreement to arbitrate. Br. 20 n.2.

or claims . . . will be resolved under GameStop C.A.R.E.S. rather than in court.”

App.88 (emphasis added).

Courts in other jurisdictions have held parties to agreements even where those parties were less literate and sophisticated than Ms. New. *See Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (holding that arbitration agreement signed by illiterate buyers was not unconscionable); *Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3d Cir. 2008) (upholding arbitration agreement signed by former employee signed in a foreign language); *Soto v. State Indus. Prods, Inc.*, 642 F.3d 67 (1st Cir. 2011) (determining that Spanish-speaking employee’s consent to arbitrate was not erroneous or void despite her lack of fluency in English).

Ms. New’s argument (at 21) that someone should have explained to her that she was agreeing to arbitrate is unavailing. Even “the failure to read a contract before signing it does not excuse a person from being bound by its terms.” *Reddy v. Cmty. Health Found. of Man*, 171 W. Va. 386, 373, 298 S.E.2d 906, 910 (1982). Here, Ms. New indisputably signed an acknowledgment that noted her agreement to arbitrate. App.88.

Ms. New’s alleged inability to reject the arbitration agreement does not amount to procedural unconscionability, either. Indeed, Ms. New was fully capable of rejecting GameStop’s offer of employment. At that point, GameStop would have

been forced to seek another employee willing to accept employment on the terms offered. It is Ms. New's ability to reject GameStop's offer that gave her bargaining power.

At best, Ms. New contends that the arbitration agreement is a contract of adhesion. But this Court has rejected any rule that adhesion contracts are unenforceable. *Brown I*, 724 S.E.2d at 286 (“[I]t would be impractical to void every agreement merely because of its adhesive nature.”) (internal quotation marks and citation omitted). Put simply, “[t]here is *nothing* inherently wrong with a contract of adhesion.” *Id.* (emphasis added; internal quotation marks and citation omitted).

Even if the arbitration agreement is one of adhesion, that is not the end of the analysis. *Clites*, 224 W. Va. at 305, 685 S.E.2d at 700. Rather, the Court considers whether the agreement is “unconscionable or was thrust upon the Petitioner because she was unwary and taken advantage of.” *Id.* (internal quotation marks, brackets and citation omitted). Ms. New does not, because she cannot, point to evidence of any unconscionability or that she was unwary or taken advantage of. As in *Clites*, there is no procedural unconscionability.²

² Ms. New cites (at 21) *Brown I*, 724 S.E.2d at 286, for the proposition that employment agreements are more likely to be found unconscionable than commercial agreements. But *Brown I* did not set forth a *per se* rule, and merely noted the possibility of procedural unconscionability *if* the employee did not have other options. *Id.* at n.117. Ms. New does not address any evidence supporting finding procedural unconscionability here because there is none.

2. Whether Ms. New's Claims are Time Barred is Irrelevant and for The Arbitrator, Not This Court, to Decide.

Ms. New's final attempt to show procedural unconscionability is to argue (at 21-24) that the agreement to arbitrate is somehow unduly complex. Specifically, she contends that there is ambiguity as to whether the arbitration agreement imposed a reduced limitations period on her West Virginia state-law claims. That argument has no bearing on the issue before this Court for at least two reasons.

First, the circuit court never determined that Ms. New's claims are time barred, so its order compelling arbitration does not rest on that basis. The circuit court simply (and correctly) "determined that an agreement to arbitrate exists between the Plaintiff and Defendants." App.162.

Second, whether the claims are barred is a matter for the arbitrator, not this Court. *TD Ameritrade*, 225 W. Va. at 253, 692 S.E.2d at 296 ("The law is well-settled 'that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.'") (*quoting AT&T Techs., Inc. v. Comms. Workers*, 475 U.S. 643, 649 (1986)).³

³ As Ms. New acknowledges (at 23), GameStop has judicially admitted that the two-year statute of limitations under West Virginia law is not altered by the arbitration agreement. In the early phases of the case, GameStop noted that Ms. New's time to file at least some of her claims had passed. App.58. In light of Ms. New's argument below that her state-law claims were barred, GameStop clarified that "[t]he only claim which is barred is a claim under federal law[.]" App.120 (emphasis in original). Thus, GameStop made abundantly clear below—as it does

B. There is No Substantive Unconscionability.

Ms. New points to only two provisions of C.A.R.E.S. as the basis for her argument that the arbitration agreement is unconscionable: (1) it impermissibly bars claims by shortening the statute of limitations; and (2) GameStop retained the unfettered right to change the policy. Neither argument comes close to establishing unconscionability.

1. Ms. New’s Insistence that Her Claims are Time Barred is Both Irrelevant and Incorrect.

Ms. New’s brief confusingly argues that the arbitration agreement is unconscionable because her claims would be time barred under C.A.R.E.S. As already explained, however, that is not an issue this Court need, or can, decide. *See supra* at II.A.2. The only issue before this Court is whether the agreement *to arbitrate* is unconscionable (and it is not). Issues about the merits of Ms. New’s claims—like whether they are time-barred—are for the arbitrator to decide.

In all events, the premise of Ms. New’s argument is flawed. As GameStop has stated, and Ms. New acknowledges (at 23), C.A.R.E.S. is straightforward: “[T]he time period allowed by law applicable to the Covered Claim at issue” governs when the notice of intent to arbitrate is due, “just as the requirement applies if [plaintiff] were proceeding in court.” App.213; *see also Pomposi*, 2010 WL

again on appeal—that it does not view any of Ms. New’s state-law claims to be time-barred.

147196, at *11-12 (disagreeing with plaintiff's assertion that C.A.R.E.S. alters the statute of limitations because agreement plainly states that it does not alter the limitations period imposed by the law that governs the claim). That provision, like the agreement to arbitrate itself, is "crystal clear." *See Ellerbee*, 604 F. Supp. 2d at 355 (noting that "the Rules were crystal clear").

2. GameStop Does Not Have an "Unfettered Right" to Alter the Arbitration Agreement.

This Court has explained that "mutuality of obligation is the locus around which substantive unconscionability analysis revolves." *Brown II*, 729 S.E.2d at 228 (citation and quotation marks omitted). Because there is mutuality of obligation here, there is no substantive unconscionability.

While GameStop retains the right to alter any other part of the handbook at any time, it has given up the right to alter the C.A.R.E.S. program except with 30 days notice, and any changes are prospective only. App.209. Nonetheless, Ms. New contends (at 19) that GameStop has an "unfettered right to alter the arbitration agreement in the case at bar." That interpretation is at odds with the agreement itself.

There is no serious dispute that the C.A.R.E.S. Rules for Dispute Resolution cannot be altered for any pending grievances. App.209 ("[A]ny such modification or rescission shall be applied *prospectively only*." (emphasis added). That language eliminates any hint that GameStop has an "unfettered" right to change the

C.A.R.E.S. program at any time. *Pomposi*, 2010 WL 147196, at *12-13 (noting that C.A.R.E.S. is not subject to modification at any time, and cannot be modified for pending claims); *see also Martin v. Citibank, Inc.*, 567 F. Supp. 2d 36, 45 (D.D.C. 2008) (noting that requirement for employer to provide 30 days notice of prospective modifications to arbitration agreement “affords employees sufficient protection against inequitable assertions of power”); *Duncan v. Office Depot*, 973 F. Supp. 1171, 1175 (D. Or. 1997) (explaining that employer may prospectively modify terms of employment, and employee impliedly accepts such modification by continuing employment).

Importantly, C.A.R.E.S. is mutual and there is more than a “modicum of bilaterality.” *Brown I*, 724 S.E.2d at 293-94; *see also Montgomery v. Credit One Bank, NA*, 848 F. Supp. 2d 601, 607 (S.D. W. Va. 2012) (noting an agreement is bilateral where, as here, both parties must submit all claims to arbitration). As the Rules state, C.A.R.E.S. is “the sole method used to resolve *any* Covered Claim . . . regardless of when the dispute or claim arose.”⁴ App.208 (emphasis added); *see also Pomposi*, 2010 WL 147196, at *12 (“[T]he C.A.R.E.S. program does in fact apply to GameStop as well as employees.”). Thus, GameStop has not reserved “the right to use the courts for its most important remedies, at the same time that it

⁴ The only uncovered claims are those for benefits under a written employee pension or welfare benefit plan, including claims covered under ERISA; claims for unemployment compensation benefits; criminal charges; and matters within the jurisdiction of the National Labor Relations Board. App.210.

denies the forum to [plaintiff] with respect to [her] most important remedies[.]”
Dunlap v. Berger, 221 W. Va. 549, 564, 567 S.E.2d 265, 280 n.12 (W. Va. 2002).

Moreover, C.A.R.E.S. incorporates the AAA’s Employment Dispute Resolution Procedures, provides a neutral selection process for the arbitrator, allows either party to be represented by counsel, permits discovery in any form allowed by the Federal Rules of Civil Procedure, permits motions allowed by the Federal Rules of Civil Procedure, and applies the state or federal substantive law which would be applied by a United States District Court sitting where the events giving rise to the claim took place. App.214-16.

In fact, although Ms. New’s brief does not mention it, initiating arbitration under C.A.R.E.S. is less expensive than filing a suit in West Virginia state court. App.213 (setting forth \$125 arbitration fee, with balance to be paid by GameStop); *see also Brown I*, 724 S.E.2d at 294 (finding it troubling that the arbitration fee at issue was substantially higher than the \$145 West Virginia filing fee). This agreement is not substantively unconscionable, and Ms. New’s contrary arguments should be rejected.

Ms. New and GameStop mutually agreed to arbitrate all workplace disputes and claims that they might have. GameStop is equally bound by the mutual agreement, which is clearly stated and unambiguous. Ms. New has not shown,

because she cannot, that the agreement is unconscionable or unenforceable. Accordingly, the circuit court properly compelled arbitration of Ms. New's claims.

CONCLUSION

For the foregoing reasons, the circuit court's order dismissing petitioner's suit should be affirmed.

March th~~21~~, 2013

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondents' Brief has been filed by serving a copy on the clerk of the court at the West Virginia Supreme Court of Appeals and on counsel of record through the First Class Mail on March 27, 2013.

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